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No. 511

In the Supreme Court of the United States

OCTOBER TERM, 1947

UNITED STATES OF AMERICA, PETITIONER

V.

KANSAS CITY LIFE INSURANCE COMPANY, RESPONDENT

RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

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No. 621

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V.

KANSAS CITY LIFE INSURANCE COMPANY, RESPONDENT

RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

STATEMENT

The impression which petitioner seeks to give is that slight and temporary damage was done to this real estate, and that in respect to drainage only. The findings show serious and permanent injury to the land due to raising the water level of the creek on which it was situated.

Before the erection and operation of the dam, drainage on this farm was through Dardenne Creek (Fdg. 14, R. 28; Fdg. 18, R. 31), a nonnavigable stream on which the property is located. This creek was then only two or three feet

deep (Fdg. 17, R. 30; Fdg. 18, R. 31). Vertical drainage, though slow, was effective (Fdg. 14, R. 28). The lowest land on respondent's farm was several feet above ordinary high water level at Dixon's Landing on the Mississippi which corresponded to the water level of Dardenne Creek (Fdg. 11, R. 31; Fdg. 17, R. 31).

The system of locks and dams (one of which, No. 26, is involved here) was put in operation for the purpose of providing a continuous nine foot channel for the Mississippi River (Fdg. 4, R. 22). This, of necessity, raised the level of the river which in turn raised Dardenne Creek six or seven feet (Fdg. 18, R. 31) above its previous level so that the creek water now backs into the outlet pipes in respondent's levee thereby obstructing and delaying drainage of surface water; and by maintaining the surface of the water at an elevation of 420 feet or more above sea level, the drainage of underground water from respondent's farm has been almost entirely shut off (Fdg. 18, R. 31).

The water in the sand below the soil on this farm and the ground water in the soil itself, rises and falls as the river rises and falls. When the river is low the ground water is low, when the river is high the ground water is high (Fdg. 16, R. 30). This of course is due to the water flowing back into Dardenne Creek and pushing into the soil and to water normally draining out of the soil not being able to get through. But the water table under the land is always higher than the water level of the river (Fdg. 16, R. 30; Fdg. 20, R. 32).

The Court found:

> Records of the river stages during those years [prior to 1938] reveal that there was almost always several months at the end of the year and about three months at the beginning of the year when the river

stage was at an elevation of 410 feet or below. Under those conditions, an opportunity was provided for draining the surface and subsurface water from plaintiff's farm sufficiently for the planting, cultivation and harvesting of crops. Since the dam has been in operation, the conditions and the period of time, formerly available for draining the land and drying the soil, no longer exist (Fdg. 19, R. 31, 32).

The effects of the dam were apparent soon after full pool stage was obtained. The surface of the soil dried out more slowly than before and drainage ditches were not so effective. The soil remained excessively wet. Planting of crops was delayed, farm machinery became mired and had to cease operation. Seed failed to germinate in many places. It was impossible to follow a proper crop rotation program (Fdg. 21, R. 32).

After the dam was placed in operation the ground water rose on 385 acres of this land (which had an elevation of about 424 feet mean sea level) to within three feet of its surface reducing its market value by more than one-half its former value (Fdg. 26, R. 34, 35). Such rise in water on 420 acres (at elevation between 424 and 425) reduced its market value about one-half as much as the reduction in value of the 385 acres of land (Fdg. 27, R. 35).

The findings of the court were that when a water table is held to within three feet of the surface, the soil remains cold and the seed rots or its germination is greatly delayed. If the underground water table is within three to five feet of the surface plants do not have a normal rooting because the air space is filled with water in the lower layers which converts nitrogen into ammonia which is detrimental to plant life (Fdg. 14, R. 28, 29). And this situation existed on the land found by the court below to have been diminished in market value (Fdgs. 26 and 27, R. 34, 35).

SUMMARY OF ARGUMENT

1. Fifth Amendment requires United States to pay compensation to owner of land on non-navigable creek flowing into navigable river where Government seriously injures said land by raising level of navigable river to and maintaining it at high water mark.

2. There is a taking where Government, by placing in operation Lock and Dam, causes percolation seepage and rise in ground water under soil of landowner and destroys drainage rendering land unfit for cultivation of crops.

3. Finding of Court of Claims as to what has been taken is sufficient.

4. Court of Claims was justified in rendering judgment for respondent on the basis of statute providing for payment for this land, whether or not there was a servitude by the Government or a taking.

ARGUMENT

1.

Petitioner relies on the case of *United States* v. *Willow River Power Company*, 324 U. S. 499, as holding no compensation should be paid.

The land in the instant case is located on a non-navigable creek which empties into the Mississippi River. The land is a mile and a half from the river (Fdg. 2, R. 21).

In the *Willow River* case the real estate was located directly on the St. Croix River, a navigable stream. The Court based its decision on the fact that the dam itself was "close to or upon the banks of the St. Croix." The Court also held that the claimant in that case had itself destroyed the natural flow of the non-navigable stream and

had created an artificial stream. "But the Government has not interfered with any natural flow of the Willow [the non-navigable stream in that case] past claimant's lands. Where it was riparian owner along Willow's natural channel claimant already had created an artificial level much above the Government level." The Willow River case bears out in every respect the claim of respondent in this case. A number of times it makes the distinction between property on a navigable stream and property on a non-navigable stream:

> The doctrine of riparian rights attained its maximum authority on non-navigable streams. No overriding public interest chilled the contest between owners to get the utmost in benefits from flowing streams. Physical conditions usually favored practical utilization of theoretical rights. In general non-navigable streams were small, shifted their courses easily and were not stable enough to serve as property lines as larger streams often do. They were shallow, could be forded and were no great obstacle to tillage or pasturage on two sides of the stream as a single operation. Such streams, like the lands, were fenced in, and while the waters might show resentment by carrying away a few spans of fence in the spring, the riparian owner's rights in such streams were acknowledged by the custom of the countryside as well as recognized by the law. In such surroundings and as between such owners equality of benefits from flowing waters was sought in the rule that each was entitled to their natural flow, subject only to a reasonable riparian use which must not substantially diminish their quantity or impair their quality. It was in such a stream that this Court found Cress as a landowner under the law of Kentucky possessed "the right to have the water flow away from the mill-dam unobstructed, except as in the course of nature. 243 U. S. 316, 330." l. c. 505.

After discussing the facts in the *Cress* case, the court proceeds:

> . . . The *Cress* case is significant in that it measured the rights of a riparian owner against the Government in improving navigation by the standard which had been evolved to measure the rights of riparian owners against each other. The rights of the Government at that location were held to be no greater than those of a riparian owner, and therefore, of course, not paramount to the rights of Cress. .1. c. 506.

But the Court concludes, "On navigable streams a different right intervenes." .1. c. 507.

United States v. *Chicago, M., St. P. & P. R. Co.*, 312 U. S. 592, and *United States* v. *Commodore Park*, 324 U. S. 386, cited by petitioner, do not hold that the Government has the right to raise the water level to ordinary high water mark without liability to a property owner injured thereby where the property injured is not on a navigable stream.

In the *Chicago, M., St. P. & P. R. Co.* case the property for which the railroad asked compensation was situated in the river bed of a navigable stream, the property consisting of an embankment and some tracks that were themselves between the high and low water mark of the river.

In the *Commodore Park* case the land was situated on a navigable stream and the act complained of was causing "mud and silt to settle on that part of the land in question lying in the bed of what had been a navigable tide water creek," and destroying the navigability of the water on which the land was situated. That is to say, the land injured was actually in the river bed and the other injury asserted was denying accessibility to the navigable stream.

The court said specifically "all the waters affected were navigable." l. c. 392.

These decisions are in conformity with a number of cases which hold that the right of the Government to improve, change or build, in a navigable stream, is a dominant right to which the riparian owner's rights are subservient as far as the rights of the owner have to do with land between high and low water or with use of or access to the water of such stream. The doctrine that the Government has the right to raise the water level of a stream from low to high water mark, is based on the theory of these cases: that the Government's right in the flow of water in a navigable stream is a dominant right to which the owner's title is subservient.

All cases of that character involve rights of owners on navigable rivers and are based on the doctrine that one buying land on a navigable stream buys, as to the submerged land in front of his upland, "a qualified title, a bare technical title, not at his absolute disposal, as is his upland, but to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation." *Scranton* v. *Wheeler*, 179 U. S. 141, l. c. 163.

A similar property rule exists in private real estate transactions not affected with the public interest where one buys land completely surrounding another man's real estate. Although no easement is of record the buyer takes the property subject to the inherent right of the owner of the enclosed land to a right of way out to the road.

United States v. *Cress*, 243 U. S. 316, on which the Court of Claims relied, involved land on a non-navigable stream and the court held as to such land the Government

was liable for the erection of a dam on a navigable stream which caused a non-navigable creek to rise, flow back, and injure the land of the owner on such non-navigable stream. On such point it has never been overruled or even criticized by the Supreme Court of the United States. The case, as any other case, must also be considered in the light of later cases construing it.

If the court itself did not make the distinction between navigable and non-navigable streams, later courts have done so. We have referred to this distinction made in the *Willow River Power Company* case (*supra*). In *United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U. S. l. c. 597, the court said in reference to the *Cress* case,

> . . . In that case, the Government's improvement in a navigable stream resulted in the flooding of the plaintiff's land in and adjacent to a non-navigable stream. The owners of the land along and under the bed of the stream were held entitled to compensation for the damage to their land. . . .

Because the land in the *Chicago, M., St. P. & P. R. Co.* case was on the navigable stream the *Cress* case was held to be not applicable.

In *Mills* v. *United States*, 46 Fed. 738, l. c. 744, cited by petitioner, the court makes this same distinction:

> . . . It would seem to be otherwise if the stream were not navigable, but upon navigable waters, any franchise depending upon the use of the stream itself seems to be common to all, and to relate to the purposes of navigation and to facilities therefor. . . .

This rule has its basis in reason and common sense. A man buys a tract of land on the Mississippi River. He looks out at this great river, wide, turbulent, sweeping toward the gulf. He sees power, tremendous energy. In

fact, it is this power which he can translate into electricity which usually induces him to buy the land. He knows that over this river navigation moves and that the river has to be bridled to serve that navigation, knows that this great stream sometimes overflows its banks to wreak terrible destruction. He prefers because of the advantages to buy it and assume the risk of government action to aid and control navigation. None of these conditions exist where a man buys a farm back in the country on a little creek. Here he seeks no power or advantage of electrical plants or shipping docks. He simply settles down for the purpose of farming and the little stream that borders his farm is more or less a drainage ditch. There is nothing to lead him to believe that the great power of the Government will be exercised to control navigation. He seeks no advantage of the navigable stream, he assumes no risk going with the advantages of a navigable stream.

2.

Was there a taking? It has been said many times that the Fifth Amendment, "intended to preserve practical and substantial rights not to maintain theories," expresses a principle of fairness and not a technical rule of procedure. *United States* v. *Dickinson*, 331 U. S. 745.

As early as the case of *Pumpelly* v. *Green Bay Co.*; 13 Wall. 166, this court held that it was not necessary that some agent of the Government seize and hold the land in order to constitute a taking, that the Government could not by merely refraining "from the absolute conversion of real property" inflict on it irreparable and permanent injury without compensation because "in the narrowest sense of the word it is not *taken* for public use."

In *United States* v. *Williams*, 188 U. S. 485, this court held that a situation almost exactly the same as that in the

case at bar, constituted a taking. The facts are not set out in the decision of the Supreme Court. But from the Court of Appeals' decision, *Williams* v. *United States*, 104 Fed. 50, l. c. 53, the facts appear as follows:

> The facts found show that by reason of the obstructions so placed in the Savannah River and the dumping of mud and sand therein, the water of the river has been directly backed up and against the banks of this plantation, and forced on the land; the superinduced addition of water actually invading it, destroying its drainage, and through seepage and percolation raising the level of the water within the plantation to the level of the water in the river, and, in addition thereto, holding back and restraining in, over, and upon said plantation the freshets, the water from which was retained upon the same; by all of which the plantation has been rendered absolutely valueless. All of which is the result of the Government improvements and works, and without which its purposes could not be carried out and affected. This is a "taking" within the meaning of the fifth amendment (104 Fed. l. c. 53).

Seepage, percolation and destruction of drainage were also involved in *United States* v. *Lynah*, 188 U. S. 445, l. c. 469. These, with some overflow which together rendered the land an irreclaimable bog, were held to constitute a taking.

In *Cress* v. *United States*, 243 U. S. 316 (heretofore referred to on another point), a dam placed in the Kentucky River caused Miller's Creek, a non-navigable stream, to rise to such an extent that the owner's mill dam, situated thereon, could not be operated because the increased height of the water in the creek prevented the drop in the current necessary to run the mill. No part of the land or the mill was overflowed. The Court held this to be a taking. It said:

> . . . The right to have the water flow away from the mill dam unobstructed, except in the course of nature, is not a mere easement or appurtenance, but exists by the law of nature as an inseparable part of the land. A destruction of this right is a taking of a part of the land . . . . 243 U. S. l. c. 330.

In discussing the question the Court (p. 325) referred with approval to the holding of the *Lynah* case that backing water up against the landowners' embankment and interfering with drainage of their plantation was a taking.

The *Williams*, the *Lynah*, the *Cress* cases together establish without question that seepage, percolation and prevention of drainage caused by a dam erected by the Government, constitutes a taking if the land is seriously depreciated in value thereby.

Have any of these decisions been overruled? The *Williams* case has not been referred to again by this court. The *Lynah* case has been questioned, debated, construed and interpreted but it still remains the law on the question of taking. It was overruled in the *Chicago, M., St. P. & P. R. Co.*, case as to that part of the opinion holding the Government liable for injury to land in the bed of a navigable stream for raising its level to high water mark. But that case recognized as correct its decision on the question of taking (312 U. S. 592, l. c. 598). In *United States* v. *Dickinson*, 331 U. S. 745, l. c. 748, it was cited on the question of jurisdiction and in *United States* v. *Causby*, 328 U. S. 256, l. c. 261, note 6, it was cited with approval on the question of taking.

The *Cress* case has also been discussed in many decisions but never questioned on the principle of what constitutes taking and was quoted in *United States* v. *Causby*, 328 U. S. 256, l. c. 266, on its doctrine "it is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial that determines the question whether it is a taking."

A recent case which we think squarely in point is the *Causby* case, 328 U. S. 256, just referred to. In that case, taking was asserted because airplanes were flown over chicken farm at a height of 83 feet (which was 63 feet above the barn and 67 feet above the house) causing chickens to be frightened and killed and rendering the farm useless as a chicken farm. The land was not touched, the title was retained by the owner. The Government contended there was no taking and that the injury was consequential. The Court held that if by reason of such flights the owners could not use the land for any purpose the loss would be as complete as if the United States had entered upon the surface of the land and taken exclusive possession of it. The court said that the fact that the planes never touched the surface "would be as irrelevant as the absence in this day of the feudal livery of seisin on the transfer of real estate" l. c. 262. The court further said that some value would remain, but that use of the airspace immediately above the land would limit the utility of the land and cause a diminution in its value.

This is precisely the situation in the instant case except that the injury was done by water 3 to 5 feet under the ground. But if the Government's action 83 feet above the ground is a taking certainly its action 3 to 5 feet under the ground is likewise so. It is conceded that a flooding on top of the ground would be a taking. What possible difference would it make whether the flooding were an overflow or an underflow if it destroyed totally or in part the utility of the land?

Discussing this very question many years ago in a case where underground water had caused damage, the New York Court of Appeals stated the doctrine very clearly:

> . . . To hold that defendants would be liable, if their interference with the surface stream had damaged

> the plaintiff, by overflowing the natural banks and pressing it through the artificial embankment, but not, if they pressed it through the natural banks, would be about as sound legal justice, to my mind, as if we should have a man liable for stabbing another in the bosom, but, if he stabbed him under the arm, though the knife should come to the same point in the body, there should be no liability. . . . *Pixley* v. *Clark*, 35 N. Y. 520, l. c. 530.

The Iowa courts, in a carefully considered case, *Healey* v. *Citizens' Gas & Electric Company*, 201 N. W. 118, l. c. 121, 199 Iowa 82, l. c. 90, have held likewise:

> The *Pixley* case, and some of the other cases, hold that there is no difference in flooding one's land, whether it is by overflowing, or underflowing (percolation). The water reaches the land and injures or destroys its use in either event. . . .

The Government stresses the fact that the owner is still in possession of the land. But as stated in the Causby and other cases that does not change the landowner's right to recover to the extent that the land is taken. Partial taking is recognized in all the cases: *Jacobs* v. *United States*, 290 U. S. 13, l. c. 16; *United States* v. *Cress*, 243 U. S. 316, l. c. 327-329; as is the liability for taking of an easement: *United States* v. *Welch*, 217 U. S. 333, l. c. 339.

Petitioner has cited one United States District Court case and three United States Circuit Court of Appeals cases on the question of taking and consequential damages.

The District Court case, *Mills* v. *United States*, 46 Fed. 738, was a case where the land was on the navigable tidewater Savannah River and plaintiff asserted the right to continued use of the ebb and flow for their drainage and flooding for rice cultivation. The case was decided on

the basis that "all the right they have in the ebb and flow of the tide of the Savannah River is subordinate to the control of the government over that navigable stream, for its free navigation by the public." l. c. 747.

Lynn v. *United States*, 110 F. 2d 586, likewise was a case where the land was on a navigable stream and the decision was based on the dominant right of the Government on such streams and not on the question whether injuring the drainage was a taking. In that case also the Goverment had paid for the land and covered by that payment, the damage claimed.

Christman v. *United States*, 74 F. 2d 112, was a case where flash floods rushing down a comparatively steep descent swept over the land doing serious damage and the court held that the flood, not the dam, caused the injury. All of these are distinguishable from the instant case.

United States v. *Meyer*, 113 F. 2d 387, used the language quoted in petitioner's brief. The facts were not stated, the cases cited were not subsurface drainage cases. The case therefore is of little value and is in conflict with the Supreme Court cases heretofore cited.

In the instant case the Government has placed a dam in the Mississippi River with the result that water is kept in the ground of respondent (from Dardenne Creek which borders the land) so near the surface as to destroy the value of the land to the extent of over one-half its value on one tract and more than one-fourth its value on another. And this condition will be permanent as it is due to a general policy of the Government to maintain a continuous nine foot channel. The water is held there day after day, night after night except in times of flood. The water continues to push into the soil, it cannot drain out.

How there could be a more complete invasion is hard to imagine.

3.

Petitioner asserts that the description of the property is not sufficiently accurate. The finding was not attacked below, no motion for a new trial was filed. This point is based on the *Causby* case where the Court said, "The Court of Claims held, as we have noted, that an easement was taken. But the findings of fact contain no precise description as to its nature. It is not described in terms of frequency of flight, permissible altitude, or type of airplane. Nor is there a finding as to whether the easement taken was temporary or permanent."

The Court's finding on this question is set out on page 13 of Petition for a Writ of Certiorari and in Finding 29 (R. 35). It is clear, concise and full. The Government is amply protected thereby. If the property were conveyed it would be made subject to this right of the Government and the language of the finding would be set out. To permanently maintain Lock and Dam No. 26 at their present height and operate them in such a manner as to fulfill the purposes of their construction and other purposes which may develop in the future and do not greatly vary from the present purpose is all the Government has ever sought and no buyer of property could be deceived by this language.

4.

There is the further reason why the judgment of the Court of Claims should be affirmed: Congress has by specific Act authorized payment for the injury done. (Act of August 26, 1937, Public No. 392, 75th Congress 50 Stat. 844, 848) The Court of Claims took the view that this

Act of Congress did not constitute a waiver of immunity from suit.

The record shows that for many years Congress has been seeking information as to the effect of the erection of the system of dams of which Dam No. 26 is one. On the basis of a report made in 1935 the Committee on Rivers and Harbors of the House of Representatives passed a resolution asking the Board of Engineers for Rivers and Harbors to make further investigation with a view to finding the exact damage to these properties by seepage, backwater and increased cost of drainage (Fdg. 7, R. 23).

After a thorough investigation this Board made, in 1936, a complete report including the recommendation of the District Engineer showing very extensive damage to these properties including that involved here, predicting exactly what occurred in this case (Fdg. 8, R. 23-26). As to this particular property the district engineer had found that the costs of remedial work would be more than the value of the land and recommended that 1,254 acres be bought and that as to 366 acres the owner be paid the cost of tiling and ditching, or a total payment of $93,540. The court in this case has found injury to 1107.96 acres and has fixed the depreciation of value at $22,519.60.

The District Engineer, in the report referred to, recommended that authority be granted the Secretary of War to acquire these low lying lands and that the money above referred to be made available therefor immediately (Fdg. 8, Recommendation 119, R. 24, 25).

Upon receipt of this report Congress in 1937 modified the project which had already been approved "in accordance with these recommendations of the District Engineer" (Fdg. 9, R. 26). Congress has thus specifically authorized payment for the precise injury which occurred to this land.

It is established law that even though the Government is not liable for an injury not constituting a taking, a moral obligation, for a tort, or for consequential damages, Congress can create liability therefor. In *United States* v. *Alexander*, 148 U. S. 186, l. c. 188, the Court said:

> We do not find it necessary to consider on which side of the line thus suggested the present case would fall, for we agree with the Court below in thinking that, in the Act of Congress, under which this public work was done, are found provisions giving an express remedy for property damaged though not actually taken. . . .

There are many cases to this effect.

Congress having provided for recovery, the Court of Claims has jurisdiction. *United States* v. *Kaufman*, 96 U. S. 567, l. c. 569-70.

CONCLUSION

Petitioner asserts that an authoritative determination of the questions involved here is necessary in order that the law may be clarified and as a guide to the Government.

It is submitted that the question has already been determined authoritatively by this Court in many decisions. The *Williams*, the *Lynah*, the *Cress*, the *Scranton* cases in the past, the *Chicago, M., St. P. & P. R. Co.*, the *Willow River Power Company*, the *Causby*, the *Dickinson* cases of recent date have determined the law with great clarity and have made it plain when the Government is liable and when it is not. It is respectfully submitted that this case was properly decided and no purpose will be served by further discussion of principles now firmly established.

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